IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD B. LEWIS,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
STANLEY GITT,	:	
Defendant	:	NO. 97-7216

M E M O R A N D U M

Padova, J. June , 1998

Plaintiff, Donald B. Lewis, brought this case pursuant to the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C.A. § 227 (West Supp. 1998), which makes it "unlawful for any person within the United States . . . to use any telephone facsimile machine . . . to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C.A. § 227(b)(1). He alleges that Defendant, Stanley Gitt, unlawfully sent more than fifteen such advertisements to his telephone facsimile ("fax") machine, a number of them after Plaintiff had written asking him to stop sending them.

Neither party raised the question of federal subject matter jurisdiction over the case. However, at a hearing on several motions by the parties, the Court raised it sua sponte. It had the obligation to do so once it determined that jurisdiction was uncertain because

> [f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is

> not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted). In response to the Court's questioning, the parties addressed the matter, and Plaintiff, who had the burden of establishing jurisdiction, was quite familiar with the issue and was not surprised by the Court's raising it.

The question of federal jurisdiction under 47 U.S.C.A. § 227(b)(3) is one of first impression in this Court and in this Circuit.[1] Neither the United States Court of Appeals for the Third Circuit nor any district court in the three districts of this circuit has addressed the issue. In the country at large, three federal courts of appeals and two federal district courts in other circuits have found that state courts have exclusive

[1]Two judges in this Court have had cases in private parties brought actions under 47 U.S.C.A. § 227(b)(3), but neither case raised the question of subject matter jurisdiction. The cases were decided in the early days of interpreting subsection (b)(3), when no court had as yet addressed the question. Lutz Appellate Services, Inc. v. Curry, 859 F. Supp. 180 (E.D. Pa. 1994) (holding faxes advertising employment opportunities to current employees of business where defendant had formerly worked was not within the scope of § 227); Forman v. Data Transfer, Inc., 164 F.R.D. 400 (E.D. Pa. 1995) (holding plaintiffs did not meet class certification requirements). In addition, another early district court decision and the court of appeals decision that affirmed the district court also failed to address the issue of jurisdiction under section (b)(3). Design Ventures, Ltd. v. Federal Communications Commission, 844 F. Supp. 632 (D.Or. 1994), aff'd, 46 F.3d 54 (9th Cir. 1995).

jurisdiction over section 227(b)(3).[2] Internat'l Science & Tech. Inst., Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir. 1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir. 1998); Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd., 975 F. Supp. 329 (S.D.N.Y. 1997); Murphey v. Lanier, No. 97-CV-1974-BTM(POR), -- F. Supp. -- , 1998 WL 154410 (S.D.Cal. Mar. 30, 1998). Only one federal court has held that there is concurrent state and federal subject matter jurisdiction; it did so in two opinions in the same case, an initial one on jurisdiction and a second one addressing a motion for reconsideration of the first decision, as well as other matters. Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912 (S.D. Ind. 1995); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997).

The purpose of the TCPA is "to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment." H.R. Rep. No. 102-317 at 5, reprinted in 14082 U.S. Congressional Serial Set, 102d Cong. 1st Sess. 1991. It was designed "to return a measure of control to both individual residential telephone customers and owners of

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[2]The most thorough and influential of the opinions finding no federal jurisdiction is that of the United States Court of Appeals for the Fourth Circuit in International Science, 106 F.3d 1146 (4th Cir. 1997). Every succeeding opinion which found no jurisdiction relies on International Science for support.

facsimile machines." Id. at 6. With respect to the use of faxes, specifically, the House of Representatives Report noted that the "proliferation of facsimile machines has been accompanied by explosive growth in unsolicited facsimile advertising, or 'junk fax.'" Id. at 10. The House Report noted two problems with this type of telemarketing: "First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." Id. To remedy this situation, 47 U.S.C.A. § 227(b) provides, in pertinent part:

> **(1) Prohibitions**
>
> > It shall be unlawful for any person within the United States --
> >
> > . . .
> >
> > **(C)** to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; . . .

27 U.S.C.A. § 227(b)(1)(C). Elsewhere in section 227, "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 27 U.S.C.A. § 227(a)(4).

The TCPA authorizes states attorneys general to bring civil actions on behalf of the residents of their respective states for an injunction or money damages or both. 47 U.S.C.A. § 227(f)(1). In such actions, the TCPA gives the federal district

courts exclusive jurisdiction. 47 U.S.C.A. 227(f)(2). In addition, the TCPA creates a private right of action:

> **(3) Private right of action**
>
> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State --
>
> **(A)** an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> **(B)** an action to recover for actual monetary loss from such violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> **(C)** both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C.A. § 227(b)(3).

The passage on which the question of jurisdiction in this case hinges is the following: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State . . . an action based on a violation of this subsection." 47 U.S.C.A. § 227(b)(3) (emphasis added).

The word "may" in the above passage is susceptible of several different interpretations:

1. Proponents of concurrent state and federal jurisdiction take "may" to refer to the court in which the action may be

brought. They argue that the permissive word “may” shows that state jurisdiction is not exclusive. The passage cannot confer federal jurisdiction, but it is taken to imply federal jurisdiction because state jurisdiction is not exclusive.

2. A quite different interpretation, which this Court favors, is that the word refers to additional parties authorized to bring suit, namely, private parties. This reading of “may” supports exclusive state court jurisdiction. Subsection 227(b)(3), authorizing a private right of action, was a relatively late addition to the TCPA. International Science, 106 F.3d at 1152. Senator Hollings, the bill's sponsor in the House of Representatives discussed the importance of allowing consumers to bring suit in state court. 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings), quoted in International Science, 106 F.3d at 1152-53; see discussion of legislative history, infra. The term “may” in the subsection can thus be read to mean that private individuals and entities, in addition to states attorneys general, are authorized to bring actions and may do so if they wish. As in the first interpretation, “may” is used in the permissive sense, but here the permission relates to the authorization of additional parties, not the choice of courts. Under this interpretation, the rest of the passage directs the private parties where to bring their actions: in state court.

3. Another possibility is that Congress used the term “may,” rather than “shall,” because it wished to tread lightly in order

to avoid the appearance of encroaching on the territory of the state courts or of attempting to coerce them. In furtherance of this goal, Congress might have preferred the permissive "may" to the directive "shall." Senator Hollings stated, "[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, . . ." Id. Another example of congressional deference to the states in subsection 227(b)(3) is the provision that no private cause of action will lie unless it is "otherwise permitted by the laws or rules of court of a State."

Proponents of exclusive state jurisdiction note that mentioning state courts is not usually necessary to vest them with jurisdiction. They are presumed to have jurisdiction over federally created causes of action unless Congress indicates otherwise. International Science, 106 F.3d at 1152. The fact that Congress did mention state courts, and only state courts, in subsection 227(b)(3) is an indication that it meant to confer jurisdiction on them only.

The one thing the permissive "may" in the first part of subsection 227(b)(3) cannot do is, by itself, confer federal jurisdiction. In a court of limited jurisdiction, a positive authorization is required, a specific grant of jurisdiction. International Science, 106 F.3d at 1151-52; Kokkonen, 511 U.S. at 377. The language of the subsection fails to overcome the presumption against jurisdiction inherent in the limited jurisdiction of the federal courts. Kokkonen, 511 U.S. at 377.

Proponents of concurrent jurisdiction must find another source for federal jurisdiciton.

The obvious candidate is 28 U.S.C.A. § 1331 (West 1993), which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331. Generally a suit "arises under" the law that creates the cause of action. Murphey v. Lanier, 1998 WL 154410, at *1. However, it is clear that

> § 1331 is a general federal-question statute, which gives the district courts original jurisdiction unless a specific statute assigns jurisdiction elsewhere. For example, "takings" claims in excess of $10,000 -- undoubtedly "arising under the Constitution" as the term is used in § 1331 -- have been assigned exclusively to the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1) (granting Court of Federal Claims jurisdiction) and 28 U.S.C. § 1346(a)(2) (granting district courts concurrent jurisdiction if the claim does not exceed $10,000); . . . And suits "commenced under" § 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, can be brought only in the Court of International Trade. See 28 U.S.C. 1581. See also 33 U.S.C. § 921(c) (vesting federal courts of appeals with original jurisdiction to review agency orders under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921 et seq., and the Black Lung Benefits program, 30 U.S.C. 901 et seq.); 29 U.S.C. § 160(f) (vesting federal courts of appeals with original jurisdiction to review agency orders under National Labor Relations Act.) Thus the federal law that creates a cause of action may also manifest a particular intent to assign the cause of action to courts other than the district courts, notwithstanding the general principle announced in § 1331.

International Science, 106 F.3d at 1154-55 (emphasis added) (footnote omitted). Not all of the statutes mentioned in the above quotation confer jurisdiction outside the district courts

explicitly. The first statute mentioned, the one that confers exclusive jurisdiction on the Court of Federal Claims for "takings" claims in excess of $10,000, does not. It is only when that statute is read with the second statute, which gives the district courts jurisdiction for claims that do not exceed $10,000, the intent of Congress becomes clear. Similarly in this case, exclusive state court jurisdiction is not explicitly stated in 47 U.S.C.A. § 227(b)(3). However, one can infer it. Based on the example of the "takings" statute, Congress does not always use explicit language to articulate its meaning when it decides not to confer jurisdiction on the district courts.[3]

["B]ecause federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on that congressional intent manifested in the statute." International Science, 106 F.3d at 1153-54. The Court has already concluded, looking only at the text of 47 U.S.C.A. § 227(b)(3), that Congress intended to confer exclusive jurisdiction on the state courts. Next, it will look outside 47 U.S.C.A. § 227(b)(3) to the Communications Act of 1934 ("Communications Act"), 47 U.S.C.A. § 201 et. seq., as amended by the TCPA of 1991 (codified at 47 U.S.C.A. § 227), as a whole, to see how it confers jurisdiction in other sections and how

[3]The one court to hold that 47 U.S.C.A. § 227(b)(3) did confer federal jurisdiction concluded that, "had Congress intended to supersede the federal question jurisdiction provided by § 1331 and instead provide for exclusive state court jurisdiction, it could and would have done so with clear language to that effect." Kenro, 962 F. Supp. at 1164.

jurisdiction in subsection 227 (b)(3) fits in with the Act as a whole. Foxhall Realty, 975 F. Supp. at 331 (quoting Kokoszka v. Belford, 417 U.S. 642, 650 (1974)). Finally, it will also determine whether the legislative history sheds light on Congressional intent as to jurisdiction in the TCPA.

In other sections of the Communications Act, Congress was explicit in conferring concurrent jurisdiction or exclusive federal jurisdiction. See, e.g., 47 U.S.C.A. § 407 (authorizing suit in federal court or state court of general jurisdiction for common carrier's failure to comply with order of payment); 47 U.S.C.A. § 415(f) (establishing one-year limitation on suits to be brought in federal or state courts to enforce Commission order for payment of money); 47 U.S.C.A. § 553(c)(1) (authorizing suit in federal court or any other court of competent jurisdiction for unauthorized cable reception); 47 U.S.C.A. § 605(e)(3)(A) (authorizing civil action in federal court or any other court of competent jurisdiction for unauthorized publications); 47 U.S.C.A. § 227(f)(providing exclusive federal jurisdiction for actions brought by states under section 227). These examples suggest that if Congress had intended to confer concurrent jurisdiction, it would have stated so explicitly in section 227 also.

The legislative history of the TCPA suggests that, with respect to private actions under 47 U.S.C.A. § 227(b)(3), Congress intended to confer jurisdiction on the states only and that such actions were to be “treated as small claims best

resolved in state courts designed to handle them, so long as the state courts allow such actions." International Science, 106 F.3d at 1152. The bill's sponsor, Senator Hollings, explained the belated addition to § 227 of a private right of action with respect to automatic telephone dialing systems or calls using an artificial or prerecorded voice, which are also prohibited by section 227(b):

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06. Senator Hollings does not say explicitly that only states have jurisdiction over private rights of action, but the import of his statement strengthens the argument in favor of exclusive state jurisdiction. Subsection 227(b)(3), evidently added rather late in the process of amending

the Communications Act of 1934, was intended to provide the vehicle by which an individual consumer could bring an action for as little as $1000, preferably in small claims court, to vindicate his rights under the TCPA. Larger scale operations were to be brought by states attorneys general in federal court. Congress did not invite, and this Court concludes it did not intend to invite, individual consumers to bring their claims in federal court.

The Court concludes, based on its reading of the language of subsection 47 U.S.C.A. § 227(b)(3), the Communications Act as a whole, and the legislative history of the TCPA, and considering the weight of authority, that 47 U.S.C.A. § 227(b)(3) confers exclusive jurisdiction on state courts. The Court will therefore dismiss this action as it has no subject matter jurisdiction over it.

An appropriate Order follows.

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DONALD B. LEWIS,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
STANLEY GITT,	:	
Defendant	:	NO. 97-7216

O R D E R

AND NOW, this day of June, 1998, it is **HEREBY ORDERED** that this case is **DISMISSED** for lack of subject matter jurisdiction.

Plaintiff's Motion to Disqualify Jacob Synder (Doc. No. 13), Plaintiff's Motion for Summary Judgment (Doc. No. 17), and Defendant's Cross Motion for Summary Judgment (Doc. No. 20) are **DISMISSED AS MOOT.**

BY THE COURT:

JOHN R. PADOVA, J.